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Supreme Court of the United States

October Term,

No. 317

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORP., ET AL.,

Petitioner,

versus

GREAT AMERICAN INSURANCE COMPANY,

Respondent.

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORP., ET AL.,

Petitioner,

versus

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CARL V. WISNER, JR.
Attorney for Petitioner
201 Southeast Second Street
Fort Lauderdale, Florida

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now on this day comes Leo P. McKee, as trustee in bankruptcy for Industrial Finance Corporation and Commercial Capital Corporation, bankrupts, and brings this his petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit, and in support thereof would show:

REFERENCE TO OPINIONS BELOW

By this petition, pursuant to Rule 23, par. 5, of the Rules of this Court, petitioner seeks a review of two decisions of the Fifth Circuit Court of Appeals. The opinion in the first of said cases, involving Great American Insurance Company as the respondent, has been informally reported in Vol. 2 of the Advance Sheets for 316 F.2d, at page 473; the second involving American Casualty Company of Reading, Pennsylvania, as the respondent, has been informally reported in Vol. 2 of the Advance Sheets for 316 F.2d, at page 428. Copies of these opinions are appended to this petition as Appendices A and B.

STATEMENT OF JURISDICTIONAL GROUNDS

1. Judgments affirming the District Court for the Southern District of Florida, were entered April 29, 1963, by the Fifth Circuit Court of Appeals.

2. It is submitted that Sec. 2101(c), Judicial Code (28 U.S.C. Sec. 2101), confers jurisdiction on this court to review the judgments in question.

THE QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

1. Under the law of Florida can a corporate debtor "pierce the corporate veil" to assert an alleged defense arising out of activities of corporate officers.

2. In an action on a commercial blanket bond does a trustee in bankruptcy for a corporation insured under the bond have "no more rights than the bankrupt itself".

3. Can a district court in a summary hearing and without trial, determine that as a matter of law an alter ego status exists between a bankrupt corporation and one of its officers, directors and stockholders.

Jurisdiction of the district court was based on Sec. 1332, Judicial Code (28 U.S.C. 1332).

* * * * *

In respect of the first of the questions, petitioner submits that the decisions of the court below are contrary to the applicable law of the State of Florida, **Riley vs. Fatt**, 47 So. 2d 769, and its own cases of **Maule Industries, Inc. vs. Gerstel**, 232 F.2d 294, 297, and **Coryell vs. Phipps**, 128 F.2d 702, 704, affirmed by this court, 317 U.S. 406.

In respect of the second of the questions, the decisions of the court below are in conflict with applicable decisions in the Fourth Circuit Court of Appeals, **Levey vs. Jamison**, 82 F.2d 958, and its companion case, **In re**

Schluter Green & Co., 93 F.2d 810, and in contravention of its own decisions as applied to a receiver for an insolvent savings and loan association, **American Employers Insurance Company vs. Franklin Savings & Loan Co.**, 89 F.2d 224, and the companion case **Franklin Savings & Loan Co. vs. American Employers Insurance Co.**, 99 F.2d 494.

Further, as to this phase, the Fifth Circuit Court of Appeals has said,

> "The trustee is, of course, a successor of the bankrupt for many purposes. But he is much more both in the extraordinary rights with which the Bankruptcy Act invests him and as a general representative of the creditors." **Coleman vs. Alcock**, 272 F.2d 618, 621-622.

In respect of the third question, a leading case in the Federal Courts on the subject of establishing the status of alter ego is the Tenth Circuit Case of **Fish vs. East**, 114 F.2d 177, in which the court particularly points out, page 191, 114 F.2d, that the determination of the status of alter ego "is primarily a question of fact and degree". Thus, in holding as a matter of law that an alter ego status existed, the decision of the court was clearly erroneous.

ARGUMENT

Note: In all references to the records below, the docket numbers of the case follow the page designation to differentiate the records.

(a) THE FACTS

On April 24, 1959, Robert A. McKee (there is no familial or other relationship between Robert A. McKee and petitioner, Leo P. McKee, the trustee in bankruptcy) activated Commercial Capital Corporation with offices in St. Petersburg, Florida. His purpose was to create a so-called "eight-percenter", in which the corporation borrowed money from the public on notes maturing within a year, paying interest monthly at an eight percent annual rate. The corporation was insolvent within the meaning of Sec. 1(19) of the Acts of Congress relating to bankruptcy and had creditors from the date of its activation to the date of the filing of the petition. (Rec. 7, 19954).

September 29, 1959, respondent, American Casualty Company of Reading, Pennsylvania, issued its commercial blanket bond No. 903,434 to the bankrupt Commercial Capital Corporation in an amount of $100,000. (Rec. 15-21, 19954). This bond was cancelled January 27, 1960, but during its effective period, defalcations of Robert A. McKee and others in the amount of $46,585.14 occurred.

On September 7, 1959, Robert A. McKee organized Industrial Finance Corporation to further his eight percenter enterprise on the East Coast of Florida. It likewise, was insolvent and had creditors from the date of its organization to the date the bankruptcy petition was filed. (Rec. 5, 19940). On the date of cancellation of the $100,000 commercial blanket bond of the respondent, American Casualty Company of Reading, Pennsylvania, January 27, 1960, the respondent, Great American Insurance Company, in case No. 19940 below, executed and delivered its commercial blanket bond, No. 8,046,540, in the amount of

$100,000. This bond was cancelled June 28, 1961, by the respondent (Rec. 49, 19940), because Robert A. McKee had been telling his "investors" that the bond in suit was issued by the respondent to protect their investments in the bankrupt Industrial Finance Corporation and Commercial Capital Corporation.

The premiums on both bonds in suit were paid by the bankrupt corporations and not by Robert A. McKee. (Rec. 2, 19940, Rec. 5, 19954). The bond of respondent, American Casualty Company of Reading, Pennsylvania, was issued to Commercial Capital Corporation; the bond of respondent, Great American Insurance Company was issued with the curious nomenclature for the obligee, "Robert A. McKee, d b a Industrial Finance Corporation and Commercial Capital Corporation." (Rec. 21, 19940).

During the effective period of the bond of the respondent, Great American Insurance Company, McKee and his confederates abstracted $267,720.87 from the funds of the two bankrupts.

(b) THE DECISIONS BELOW

In the case involving the respondent, American Casualty Company of Reading, Pennsylvania, notwithstanding the circumstances that the premiums on the bond were paid by the bankrupt Commercial Capital Corporation, the court held that

> "Robert A. McKee, the principal officer and sole stockholder who perpetrated the fraud, **as a matter of law** was the alter ego of the obligee-bankrupt." (Emphasis ours)

The court further held that McKee's knowledge of the frauds was imputed to the bankrupt and, notice not having been given within ninety days after the imputed discovery, the suit could not be maintained.

The court went on to say:

> "The fact that McKee took the corporation's money does not insulate it from the knowledge he possessed since there was no adverse interest between McKee and the corporation wholly owned by him."

The record shows (Rec. 7, 19954) that there were one-half million dollars of noteholders between McKee and the corporation during the effective period of the bond.

In the Great American Insurance Company case, the court below took the position that, notwithstanding the facts that (a) Industrial Finance Corporation had paid the premiums on the bond, (Rec. 2, 38, 19940), (b) the agent for the surety company was responsible for the nomenclature of the obligee as "Robert A. McKee d b a Industrial Finance Corporation and Commercial Capital Corporation," (Rec. 41-42, 19940) and (c) the bond in suit identified Robert A. McKee as one of the employees covered (Rec. 54, 19940), and held that the trustee could not maintain the action.

(c) ARGUMENT

Robert A. McKee set up two corporations of which for the major portion of the time here in question, he was the sole stockholder, borrowed approximately a mil-

lion dollars from the public, and went bankrupt. The first of the bonds in suit was applicable only to the first created corporation, was effective for a short period, during which abstractions of $46,585.14 within the terms of the coverage of the bond occurred. On the date of cancellation of that bond, a second bond was issued by respondent, Great American Insurance Company, covering both bankrupt corporations, effective from January 27, 1960, to June 26, 1961, during the effective period of which abstractions of $267,720.87 within the terms of coverage of the bond occurred.

As to the first bond, the court below has held that **as a matter of law** Robert A. McKee was the alter ego of the obligee-bankrupt, that his knowledge of his own defalcations was imputed to the obligee-bankrupt, that the trustee had no more rights than the bankrupt, and could not maintain the suit.

Of this we say first that, under the law of Florida which is applicable, only a creditor can pierce the corporate veil, **Riley vs. Fatt,** 47 So. 2d 769; Cf. **Maule Industries, Inc., vs. Gerstel,** (5th Cir.) 232 F.2d, 294, 297; **Coryell vs. Phipps,** (5th Cir.) 128 F.2d 702, 704, affirmed 317 U.S. 406; and this remedy is not afforded debtors such as the obligors on these bonds. Second, that the alter ego status is primarily a question of fact. It cannot be determined in summary proceedings but only after a trial. Cf. **Fish vs. East,** (10th Cir.) 114 F.2d 177. This is the more true since the complaint in each of the suits alleges, par. 8 f., 19940 (Rec. 7, 19940), par. 7 e., 19954 (Rec. 8, 19954):

> "That at all times during the effective date of the bond, the said Robert A. McKee was an

employee of one or the other of the plaintiff's bankrupts, and the transfers by him made, herein complained of, were made by him as such an employee and not as an officer, director or stockholder of one or the other of the plaintiff's bankrupts;"

Finally, in reaching the conclusion that it did, the court below relied on its own decision in **Franklin Savings & Loan Company vs. American Employers Insurance Company**, (5th Cir.) 99 F.2d 494, which holds exactly to the contrary. The cited case dealt with a receiver for a building and loan association and permitted the receiver to recover on a commercial blanket bond for defalcations caused by the activities of the president and principal officer of the insolvent association. While the surety urged that knowledge of the defalcations was imputed to the corporation, the court refused so to do, 99 F.2d at page 497.

In the Great American Insurance Company case, the court below relied solely on the nomenclature of the bond, notwithstanding the circumstance that the party responsible for the nomenclature was the agent of the obligor (Rec. 41-42, 19940), that Robert A. McKee was identified in the bond application as a covered employee, and the bankrupt Industrial Finance Corporation paid the premium on the bond.

SUMMARY

The case is of importance to Floridian investors who have almost a million dollars at stake in the two bankrupts. In the instance of the Great American Insurance Company bond, Robert A. McKee deliberately used the existence of the bond as an argument in the sale of his "securities", representing in effect that the bond was issued to insure their safety.

It is further respectfully submitted, that the statements of the court below in 316 F.2d 428, at page 429,

> ". . . the principal officer and sole stockholder who perpetrated the fraud, as a matter of law was the alter ego of the obligee-bankrupt, . . ."

and the further statement at page 430 of 316 F.2d,

> ". . . the trustee who has no more rights than the bankrupt itself, may not maintain the suit."

are clearly contrary to law, and in the future will rise to plague litigants and the courts if they are not corrected by the action of this court.

All of which is respectfully submitted.

CARL V. WISNER, JR.
Attorney for Petitioner
201 Southeast Second Street
Fort Lauderdale, Florida

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19940

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORPORATION, ET AL.,

Appellants,

versus

GREAT AMERICAN INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 29, 1963)

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

PER CURIAM: It appearing that the plaintiff-trustee is suing the obligor on a commercial blanket bond covering loss sustained by the insured through fraudulent or dishonest acts committed by any of the insured's employees, and it appearing further that the bond issued to the principal officer and sole stockholder of the two

bankrupt companies (in favor of "Robert A. McKee [no relation to the trustee in bankruptcy] d b a Industrial Finance Corporation and Commercial Capital Corporation") for whom the plaintiff is the trustee in bankruptcy, and it appearing further that the fidelity losses the trustee sues upon were occasioned by the fraudulent acts of Robert A. McKee, we conclude, as did the district court in granting the defendant's motion for summary judgment, that the bonds did not cover the defalcations of Robert A. McKee, the principal officer and sole stockholder of the corporations.

The judgment is hereby

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
July 17, 1963

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19954

LEO P. McKEE, as Trustee for INDUSTRIAL FINANCE CORP., ET AL,
Appellants,

versus

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 29, 1963)

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges.

PER CURIAM: It appearing that the trustee in bankruptcy is suing the obligor on a commercial blanket bond issued to the trustee's bankrupt, the obligee under

the bond, and it appearing that the bond covered any losses sustained by the plaintiff's bankrupt through any dishonest, fraudulent or criminal act of any of the employees of the bankrupt, which losses are sustained while the bond is in force and discovered by the obligee within twelve (12) months after the bond is cancelled, and further that liability only attaches if the obligee has notified the obligor within 90 days of discovering the loss, it appearing further that the fidelity losses involved were occasioned by the fraudulent acts of Robert A. McKee (no relation to the trustee), the "sole stockholder and the dominant factor in its (the bankrupt corporation) operation during the effective period of the bond," (language of the complaint) it appearing further that the trustee notified the defendant only after the expiration of 18 months from the termination date of the bond (approximately the date the trustee was appointed), and it appearing that the trustee did not notify the surety within 90 days of the alleged date of discovery, we conclude:

That the obligee under the bond, the bankrupt, had "discovered" the loss within the twelve months' period by reason of the fact that Robert A. McKee, the principal officer and sole stockholder who perpetrated the fraud, as a matter of law was the alter ego of the obligee-bankrupt, and that no notice having been given within 90 days after this imputed discovery by the obligee, the trustee who has no more rights than the bankrupt itself, may not maintain the suit. The fact that McKee took the corporation's money does not insulate it from the knowledge he possessed since there was no adverse interest between

McKee and the corporation wholly owned by him. Cf. **Franklin Savings & Loan Co. v. American Employees Ins. Co.**, 5 Cir., 99 F. 2d 494. Furthermore, we find that by the plaintiff's own allegations the "discovery" did not occur until after the expiration of the allowable twelve months' period, so that the trustee is precluded by the first condition precedent to maintaining an action on this bond.

The judgment is

AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,

By CLARA R. JAMES
Deputy

New Orleans, Louisiana
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Respondent.

Brief of American Casualty Company of Reading, Pennsylvania, in Opposition To Petition for Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

---

B. E. HENDRICKS
Attorney for Respondent
Seybold Building
Miami, Florida
A member of the Bar of this Court

and

MOORE & MOORE
Attorneys for Respondent
1010 Biscayne Building
Miami, Florida 33130

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PRELMINARY STATEMENT

This respondent is concerned only with case number 19,954 as it appeared in the United States Court of Appeals, Fifth Circuit. This respondent challenges petitioner's statement of jurisdictional grounds (Paragraph 2) on the ground that Title 28 U.S.C. §2101 does not confer any jurisdiction but merely prescribes a time limit within which to petition this court for a writ of certiorari otherwise allowable by law.

Respondent exercises its option to restate the questions presented as permitted by Supreme Court Rule 40, Section (D)5.

QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner make timely discovery and or notice to the respondent to enable recovery under the bond?
2. Even if petitioner had made timely discovery of losses and had given timely notice to respondent, could recovery be had by petitioner as trustee for the bankrupt obligee under the bond for alleged losses occasioned by the sole stockholder and dominant factor in the operations of the Bankrupt corporation?

STATEMENT OF THE CASE

Respondent (hereinafter called "surety") executed a Bankers' Blanket Bond in an amount not to exceed $100,000.00 obligating itself as surety to indemnify a cor-

poration known as Commercial Capital Corporation (hereinafter called "obligee") against any losses (as described in the bond) sustained while the bond was in force and discovered by the obligee within twelve months after the bond was cancelled resulting from fraudulent acts of certain corporate employees (R. 15, 25 and 27). Section 3 of the "Conditions and Limitations" of the bond (R. 16) provides that the obligee must give the surety notice of any loss claimed under the bond "as soon as possible after" discovery of the loss and within ninety days after learning of the loss the obligee "shall file with the underwriter an itemized proof of claim duly sworn to."

Thus, two conditions precedent to liability must occur, to wit: first, the losses must be discovered by the obligee within twelve months after the bond was cancelled, and, second, written notice and claim must be given the surety within ninety days after timely discovery.

Petitioner, as plaintiff in the United States District Court, Southern District of Florida, sued respondent for $46,585.14 in damages claimed to be the result of certain defalcations of one ROBERT A. MC KEE, who the complaint itself states was, since the formation of the corporation, its "sole stockholder and the dominant factor in its operation during the effective period of the bond." (R. 6).

The record further shows that the bond in question was cancelled effective January 27, 1960 (S.R. 7); that the claimed losses were not discovered by the trustee until July 25, 1961 (R. 13), and that written proof of loss was furnished by the trustee to the surety on December 21, 1961.

The District Court entered summary final judgment for respondent (surety) concluding that the alleged defalcator was the alter-ego of the bond obligee (since the complaint alleged he was sole stockholder and dominant factor in its operations) and that as such, the losses were discovered by the obligee corporation at the instant they occurred at the hand of its obligee and hence **notice** to the surety given by the trustee almost two years later is untimely. (S.R. 9-12) Any other approach to the question of when the losses were discovered would have rendered the **discovery** untimely because the petitioner, as trustee for the bankrupt obligee corporation, admitted he did not discover the alleged losses, until July 25, 1961 (approximately a year and a half after cancellation of the bond).

The Court of Appeals' decision sought to be reviewed in this proceeding affirmed the District Court in finding untimely discovery and notice and in finding that the trustee can stand in no better position to sue the surety than the bankrupt could and that the bankrupt, being the alter-ego of the alleged defalcator, had no standing to sue the surety.

We challenge the first paragraph on Page 5 of the petition for writ of certiorari which concludes with a reference to Page 7 of the record in this case. Page 7 of the record was all stricken by the District Court (except the last paragraph on Page 7) by an order found on Page 1 of the supplemental record below. Petitioner's further reference to the stricken matter found on Page 7 of the petition is noted. No appeal was taken or error assigned regarding the striking of those portions of the complaint and reference to them herein is improper.

ARGUMENT

Very little can be said to amplify the findings and conclusions of the District Court and the Court of Appeals, except to point out that the problems facing the trustee in this case appeared in one form or another in three other 5th Circuit cases between 1934 and 1957 and, though the results of the cases varied because of variations in facts, the principles of law alluded to in each case are consistent. These cases are **Murray vs. American Surety Co. of New York**, 69 F.2d 147; **Franklin Savings & Loan Co. of Macon vs. American Employers Insurance Co.**, 99 F.2d 494; and **J. S. Fraering, Inc. vs. Employers Mutual Liability Insurance Co. of Wisconsin**, 242 F.2d 609.

The cases referred to in the petition concerning the Court's alter-ego finding have no application in the instant case, because in this case the complaint itself alleges the facts, which, as a matter of law as well as common sense, preclude a conclusion that ROBERT A. MC KEE was anything other than the alter-ego of COMMERCIAL CREDIT CORPORATION.

Curiously, petitioner relies upon the **Franklin Savings** case above-noted in support of its second question challenging the court's finding that the trustee has no more rights than the bankrupt itself (see Pages 4 and 9 of the petition). The distinction between the instant case and the **Franklin** case in the area concerned in petitioner's second question lies in the fact that the corporate officer in **Franklin** whose knowledge the surety was attempting to impute to the corporation, was not shown to have owned **any** stock in the corporation and was certainly not a "dominant factor" in its operations (she was

a young female bookkeeper who assisted the bonded defalcator and her only other position was that of a non-bonded director of the insured corporation). As previously noted, the defalcator in the instant case was the "sole stockholder" and "dominant factor" in the corporation's operations. This is the distinction justifying the finding of alter-ego status.

CONCLUSION

For the foregoing reasons it becomes apparent that the decision of the Court of Appeals, Fifth Circuit, found at 316 F.2d 428, herein sought to be reviewed, should be affirmed and the petition for certiorari dismissed.

It is further apparent that none of the reasons for which this Honorable Court are normally inclined to grant certiorari exists. Petitioner has failed to demonstrate that the decision complained of in any material way conflicts with any decision of another court of appeals on the same matter. Petitioner has asserted a conflict on only one of the three grounds ruled upon by the lower courts, which does not exist in fact, and which still leaves two other grounds in any event. There is no state or territorial question involved. There is no question of federal law involved, much less one of considerable import which has not been but should be decided by this Honorable Court. There has been no charge that the lower courts have so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

No other grounds for this court to accept jurisdic-

tion have been urged other than a unsupported recitation regarding the importance of the case to Floridian investors who, according to petitioner, have almost a million dollars at stake in the two bankrupts. We fail to see the importance of that statement in view of the fact that the claim against this respondent was only $46,585.14 and it but further demonstrates that petitioner seeks merely a further appeal about a matter that is of importance only to the people involved. This court has refused to grant certiorari in such instances. CF **Rice vs. Sioux City Memorial Parks Cemetery**, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897.

Respectfully submitted,

B. E. Hendricks

B. E. HENDRICKS
Attorneys for respondent
Seybold Building
Miami, Florida
A member of the Bar of this Court

-and-

MOORE & MOORE
Attorneys for respondent
1010 Biscayne Building
Miami, Florida 33130

By: William T. Moore

CERTIFICATE OF SERVICE

I hereby certify that a true printed copy of the above and foregoing Brief of American Casualty Company of Reading, Pennsylvania, in opposition to petition for writ of certiorari was mailed to Carl V. Wisner, Jr., Attorney for Petitioner, 201 Southeast Second Street, Fort Lauderdale, Florida, and to Norman C. Roettger, Jr., of the law firm of Fleming, O'Bryan & Fleming, Attorneys for Respondent, GREAT AMERICAN INSURANCE COMPANY, Professional Building, Fort Lauderdale, Florida, by deposit in the United States mails, postage prepaid, this 21st day of August, 1963.

B. E. HENDRICKS
Attorney for respondent
Seybold Building
Miami, Florida
A member of the Bar of this Court

Supreme Court of the United States

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Brief of Great American Insurance Company in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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FLEMING, O'BRYAN & FLEMING
Attorneys for respondent
Professional Building
Fort Lauderdale, Florida

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LEO P. McKEE, as Trustee for
INDUSTRIAL FINANCE CORP., et al,
Petitioner,

vs.

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA,
Respondent.

Brief of Great American Insurance Company in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PREFACE

This respondent is concerned only with Case No. 19,940 as it appeared in the United States Court of Appeals for the Fifth Circuit.

THE QUESTIONS PRESENTED FOR REVIEW

As authorized by Rule 40, respondent restates the questions set forth by the petitioner, as follows:

I. UNDER THE LAW OF FLORIDA CAN A CORPORATION CLAIM THAT IT HAS NO KNOWLEDGE OF THE ACTIVITIES OF ITS SOLE STOCKHOLDER, PRESIDENT, AND DRIVING FORCE WHEN IT SUBSEQUENTLY SEEKS TO RECOVER FOR THE DEFALCATIONS OF THAT VERY INDIVIDUAL?

II. IN AN ACTION ON A COMMERCIAL BLANKET BOND DOES A TRUSTEE IN BANKRUPTCY FOR A CORPORATION STAND IN THE SAME SHOES AS THE INSURED WHEN THE BOND SPECIFICALLY STATES THAT THE INSURED IS "ROBERT A. McKEE d/b/a INDUSTRIAL FINANCE CORPORATION AND COMMERCIAL CAPITOL CORPORATION"?

III. WHEN THE TESTIMONY IS UNCONTROVERTED BEFORE THE DISTRICT COURT IN A HEARING ON A MOTION FOR SUMMARY JUDGMENT THAT THE SOLE STOCKHOLDER WANTED A FIDELITY BOND TO PROTECT HIMSELF AND HIS COMPANY AGAINST FIDELITY LOSSES OCCASIONED BY EMPLOYEES (R. 35), WAS THE DISTRICT COURT CORRECT IN ENTERING A SUMMARY JUDG-

MENT FOR THE INSURER WHEN THE SOLE STOCKHOLDER WAS THE DEFALCATOR?

STATEMENT OF THE CASE

Respondent would augment the statement of the case and the facts presented by the petitioner.

Following the entry of summary judgment in favor of respondent, petitioner appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment with a per curiam-one paragraph opinion. 316 F.2d 473.

Certain facts should also be included for a more thorough understanding of the decisions by the lower courts, as follows:

On January 28, 1960, respondent executed a bond in the principal amount of $100,000.00 (R. 21-23) with the insured designated as "Robert A. McKee d b a Industrial Finance Corporation and Commercial Capitol Corporation". According to the allegations of the appellant's complaint, Robert A. McKee was the sole stockholder of Commercial Capitol Corporation from April 24, 1959, until the stock of Commercial was transferred by McKee to Industrial Finance Corporation on May 12, 1961. R. 3. According to petitioner's complaint, Robert A. McKee was the sole stockholder of Industrial from October 6, 1959, to January 20, 1961. R. 4.

The only testimony before the court was that of Wade H. Everhart, Jr. (R. 26-51). In his deposition Everhart related that McKee came to him to obtain a bond pro-

tecting himself against fidelity defalcations by his employees. R. 35. Everhart further testified that since McKee was the sole owner of all the stock that the obligee on the bond was written to protect his [McKee's] interest and therefore the bond was written as it was. R. 42. No testimony was presented or affidavits filed to contravert this.

In his complaint trustee alleges that Commercial Capitol Corporation was insolvent from April 24, 1959, to the present and that Industrial Finance Corporation was insolvent from October 6, 1959, to the present. R. 4, 5.

ARGUMENT

In addition to the fact that petitioner has not brought himself within the considerations governing review on certiorari, as set forth in Rule 19, the decision of the District Court and of the Court of Appeals would have to be sustained, and certiorari denied, on the simple statement of the crux of this case: when a fidelity bond is secured by an individual, doing business as two corporations, and when those corporations are wholly-owned by that individual, and the purpose is to protect himself, is the surety liable under the terms of the bond for the defalcations of that individual?

The answer is clearly no and one that correctly calls for the entry of a summary judgment for the respondent insurance company by the District Court and an affirmance of that judgment by the Court of Appeal, as was done here.

Nevertheless, respondent will discuss the several

contentions of the petitioner to show that a writ of certiorari should not be issued in the instant case.

Relying on **Riley v. Fatt**, 47 So.2d 769 (Fla. 1950), petitioner claims armored protection in the form of the corporate veil, but it is in the petitioner's own complaint we find that Commercial Capitol Corporation was insolvent from April 24, 1959, (R. 4) and Industrial Finance Corporation was insolvent from October 6, 1959, (R. 5) and that Robert A. McKee, the named insured on the bond in the instant case, was the "sole stockholder and dominant factor in its operation" (R. 5) and was such at the time the bond was executed by Robert A. McKee and the respondent on January 28, 1960. Under these facts **Riley v. Fatt** offers little solace to the petitioner, as it is a typical case of a judgment creditor attempting to levy on the personal belongings of sole stockholders as a result of supplementary proceedings in aid of execution. The court in **Riley** also indicated that there was no indication that the corporation was organized for the purpose of evading personal responsibility otherwise than in a proper manner; the corporations in the instant case were insolvent by reason of their sole stockholder's defalcations at the time he executed the bond in question. It should be pointed out that this would be another basis whereby the Court of Appeal could have affirmed the judgment for the respondent because the bond would be void in its inception as a result of the obligee's dishonesty. See Section 12 of the bond. R. 23.

Petitioner has cited cases from the Fifth Circuit Court of Appeal, which he contends would enable the trustee in bankruptcy to be able to recover on a bond when the insured under the bond would not be able to do

so. Petitioner specifically cites **Franklin Savings & Loan Co. v. American Employers Ins. Co.**, 99 F.2d 494 (5th Cir. 1938), and yet that particular case turns on the fact that the Savings & Loan was the obligee under the fidelity bond for any loss which a particular executive officer might cause through certain described acts. The crux of the decision was whether any of the described acts were committed by the managing officer and it was held that he had been guilty of wilful misapplication and acts of fraud. There is another obvious distinguishing characteristic: the corporation was the obligee and protected under the bond from the acts of a certain named employee.

In addition to the fact that the **Franklin Savings & Loan Co. v. American Employers Ins. Co.** case supports the decision complained of, there would be no basis for granting a petition for certiorari here even if there were internal conflicts within the decisions of the Fifth Circuit. **Wisniewski v. United States**, 353 U.S. 901, 902 (1957).

Petitioner also seeks to create a conflict with decisions of the Fourth Circuit Court of Appeals, citing **Levey v. Jamison**, 82 F.2d 958 (4th Cir. 1936), in an effort to show the trustee can maintain suit upon a fidelity bond. The holding of the Fourth Circuit supports the decision in the instant case because that court held:

> "It is manifest that if the jury should find that the corporation itself was a party to the acts complained of, there can be no recovery in this case. The parties to the bond did not mean insure the corporation against losses which might be caused by its own dishonesty or crime, but

merely to protect it against the dishonesty or crime of its employees. A policy of fidelity insurance does not insure an employer against his own fraud." (Citing cases from several jurisdictions). Id. at 960.

A situation similar to the instant case has been resolved by that same Fourth Circuit Court of Appeals in **Fidelity & Casualty Co. v. Hoyle**, 64 F.2d 413 (4th Cir. 1933), in which the trustee in bankruptcy sued to recover under a similar bond. The bankrupt had been clerk of the Superior Court of Guilford County, North Carolina, for some years and the bond was executed by his son, who was a deputy clerk under the bankrupt. The bankrupt was the named obligee on the bond and the evidence revealed that the obligee was thoroughly acquainted with what was going on and that most, if not all, of the improper withdrawals of funds by his son were made under the obligee's direction.

In reversing a judgment for the trustee, the Court, speaking through Judge John J. Parker, held:

> "It needs neither argument nor citation of authority to sustain the proposition that M. W. Gant, Sr., would not be allowed to recover on the bond. Not only did he not give the notice which the bond required, but he was a party to the acts complained of and is precluded from recovery by the salutary rule that the law will not allow one to profit by his own wrong. His trustees in bankruptcy, as such, have no greater rights. Zartman, Trustee, v. First National Bank 216 U.S. 134, 30 S.Ct. 368, 54 L.Ed. 418; Remington on Bankruptcy, vol. 4, Section 1409.

Finally, the petitioner complains of the entry of summary judgment in favor of the respondent and yet describes the bond as being "issued with the curious nomenclature for the obligee, 'Robert A. McKee, d b a Industrial Finance Corporation and Commercial Capitol Corporation.'" Page 6 of petitioner's brief. Petitioner also contends in his argument that in the instant case "the court below relied solely on the nomenclature of the bond. . . ." Page 9 of petitioner's brief. It can be readily seen that the instant decision turns on its own unique facts. When decisions turn solely upon an analysis of particular facts or upon construction of a particular contract, this court should not issue a writ of certiorari. **United States v. Johnston**, 268 U.S. 220, 227 (1925); Cf. **Gravey Tank & Mfg. Co. v. Linde Air Products**, 336 U.S. 271, 275 (1949), adhered to on rehearing, 339 U.S. 605.

This is a case which turns on its own peculiar facts and the construction of the bond. It has been correctly decided by both the District Court and the Court of Appeal. It falls precisely within that example of when a petition for writ of certiorari should not be granted as given by Chief Justice Taft in **Layne & Bowler Corp. v. Western Well Works**, 261 U.S. 387 (1923), quoted approvingly in **Rice v. Sioux City Cemetery**, 349 U.S. 70, 79 (1954), as follows:

> ". . . [i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of ap-

peal. The present case certainly comes under neither head." Id. at 393.

CONCLUSION

Because of petitioner's failure to show that the per curiam decision of affirmance of the Circuit Court of Appeal conflicts with a decision of another Court of Appeal or has been decided in conflict with applicable state law or has decided an important Federal question which should be decided by this court and because this particular decision turns on its own unique facts and the construction of a particular contract, this court should deny the petition for a writ of certiorari.

Respectfully submitted,

FLEMING, O'BRYAN & FLEMING
Attorneys for Respondent
Professional Building
Fort Lauderdale, Florida.

By_____
John W. Fleming